The Arbitration Review of the Americas 2021

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The Arbitration Review of the Americas 2021

A Global Arbitration Review Special Report

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Country chapters

Welcome to *The Arbitration Review of the Americas 2021*, one of *Global Arbitration Review*'s annual, yearbook-style reports.

Global Arbitration Review, for anyone unfamiliar, is the online home for international arbitration specialists everywhere, telling them all they need to know about everything that matters.

Throughout the year, *GAR* delivers pitch-perfect daily news, surveys and features, organises the liveliest events (under our GAR Live banner) and provides our readers with innovative tools and know-how products.

In addition, assisted by external contributors, we curate a series of regional reviews – online and in print – that go deeper into local developments than our journalistic output is able. *The Arbitration Review of the Americas*, which you are reading, is part of that series. It recaps the recent past and adds insight and thought-leadership from the pen of pre-eminent practitioners from around North and Latin America.

Across 18 chapters, and spanning 120 pages, this edition provides an invaluable retrospective, from 39 leading figures. All contributors are vetted for their standing and knowledge before being invited to take part. Together, our contributors capture and interpret the most substantial recent international arbitration events of the year just gone, supported by footnotes and relevant statistics. Other articles provide valuable background so that you can get up to speed quickly on the essentials of a particular country as a seat.

This edition covers Argentina, Bolivia, Canada, Ecuador, Mexico, Panama, Peru and the United States; has overviews on nascent Brazilian jurisprudence on arbitration and corruption (in the wake of Operation Carwash) and on the coronavirus and investment arbitration, among other things; and an update on how Mexico's federal courts are addressing the problem of personal injunctions against arbitrators that have brought Mexico grinding to a halt as a seat.

Among the other nuggets it contains:

- a discussion of the defences that states may lean on in public law to covid-19 claims. Are we on the verge of a *lex pandemiae* given the likely recurrence of certain questions?
- numerous real-life examples of coronavirus responses in the region that look ripe to found investment arbitration claims;
- extra questions that valuation experts need to ask when assessing a climate change-related loss;
- news that Bolivia may soon return to the investment arbitration fold;
- results of an (informal) survey on attitudes to mediation around Latin America, and whether the region 'needs' the Singapore Convention on Mediation (spoiler alert: not really); and
- a suggestion that the USMCA may not last much past the next round of North American elections, along with a forensic explanation of the changes it has introduced (and has not – for certain industries).

Plus much, much more. We hope you enjoy the review. If you have any suggestions for future editions, or want to take part in this annual project, my colleagues and I would love to hear from you. Please write to insight@globalarbitrationreview.com.

David Samuels
Publisher
July 2020

Intra-EU Investment Treaty Disputes in US Courts: Achmea, Micula and Beyond

Alexander A Yanos & Carlos Ramos-Mrosovsky*
Alston & Bird LLP

In summary

A US federal court's September 2019 decision to enforce the ICSID award in *Micula v Romania* marks the US judiciary's first decision considering the effect of the Court of Justice of the European Union's (CJEU) 2018 decision in *Slovak Republic v Achmea* on the enforceability in the US of investor-state awards arising under intra-EU treaties. In *Achmea*, the CJEU found investor-state arbitration pursuant to an 'intra-EU' treaty between EU member states contrary to EU law but the relevance of this holding for US enforcement petitions was unclear. In *Micula*, the US court enforced the award pursuant to the ICSID Convention over objections from Romania and the European Commission itself. The US Court of Appeals for the DC Circuit affirmed that decision in May of 2020.

The district court's reasoning distinguished *Achmea* but did not take the opportunity squarely to foreclose the relevance of EU law in proceedings to enforce intra-EU awards before US courts. Since claimants continue to bring major intra-EU treaty claims and to seek enforcement of the resulting awards in the US, while the European Commission's opposition to intra-EU investment arbitration has recently given rise to a 23-state agreement to reciprocally terminate intra-EU investment treaties, *Micula* is of particular relevance to investors and European states alike.

Discussion points

- The district court's decision in *Micula* rejected *Achmea*'s applicability on the facts of the case before it but did not foreclose the relevance of EU law in future proceedings to enforce intra-EU investor-state awards before federal courts in the US.
- US federal courts will have to continue to engage with 'intra-EU' jurisdictional objections.

Referenced in this article

- *Micula v Government of Romania*;
- *Slowakische Republik (Slovak Republic) v Achmea BV*;
- *Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL v Romania [I]*;
- Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention);
- Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) ;
- Foreign Sovereign Immunities Act;
- Settlement of Investment Disputes; and
- Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union.

In September 2019, a federal district court in Washington DC enforced an ICSID award against Romania in the case of *Ioan Micula et al v Government of Romania*. *Micula* marked the US judiciary's first decision considering the enforceability of an investor-state arbitration award made pursuant to a bilateral investment treaty (an intra-EU BIT) between two European Union member states since the Court of Justice of the European Union (CJEU) ruled, in *Slovak Republic v Achmea*,[1] that investor-state arbitration among EU member states was contrary to the constitutional order of the European Union.

The decision in *Micula*, affirmed by the United States Court of Appeals for the DC Circuit in May 2020, shows that so far as US courts are concerned, awards based on intra-EU BITs are potentially enforceable. At the same time, *Micula* does not foreclose the relevance of the CJEU's decision to future proceedings to enforce intra-EU investor-state awards before US courts.

The ambiguities in the *Micula* decision are significant because, notwithstanding *Achmea* and the European Commission's long-standing position that the resolution of investment disputes within the European Union should occur only within the framework of the EU's own legal system, European investors continue to bring treaty claims against EU member states. Indeed, at least 55 such intra-EU claims are currently pending before the International Centre for Settlement of Investment Disputes (ICSID) alone.[2] Some of those cases were filed quite recently, even though a majority of EU member states recently agreed to terminate more than 130 intra-EU investment treaties with retroactive effect.[3]

In addition, *Micula* is significant because enforcement actions in respect of nearly US$600 million worth of intra-EU investor-state awards are pending before United States federal district courts.[4] This article considers the potential implications of the *Micula* decision for the treatment of intra-EU awards in US federal courts.

The Micula ICSID arbitration

The *Micula* arbitration arose as a consequence of Romania's preparations for its entry into the European Union in 2007. Prior to that time, Romania had extended certain economic incentives to encourage foreign investment in its new post-Soviet economy. The claimants, two brothers of Swedish nationality but Romanian heritage, had relied on these incentives when investing in the food and beverage industry of an impoverished region of Romania.[5] Although the incentives had been meant to last for at least a decade, they were withdrawn as part of Romania's efforts to bring itself into compliance with the *acquis communautaire* in preparation for its EU accession.[6] The European Commission had advised Romania that, from the standpoint of European law, the incentives at issue constituted unlawful 'state aid' that distorted incentives and created uneven treatment within an integrated single European economy.[7]

Alleging breaches of their legitimate, investment-backed expectations as protected under the Swedish-Romanian BIT's 'fair

and equitable treatment clause', the Miculas commenced arbitration before ICSID in August of 2005.[8] After an ICSID tribunal found their claims admissible, the European Commission warned that any award reinstating the privileges abolished by Romania, or compensating the investors for the loss of those privileges, would itself constitute state aid contrary to the 'supremacy of EU law'.[9] The arbitral tribunal refused, however, to subordinate Romania's international law obligations under the BIT to the Commission's view of European law. It instead refused to 'assume that by virtue of entering into the [EU] Accession Treaty or by virtue of Romania's accession to the EU, either Romania, or Sweden, or the EU sought to amend, modify or otherwise detract from the application of the BIT'.[10] The tribunal ultimately awarded the Micula claimants compensation of approximately €178 million in December 2013 plus interest.[11]

Shortly thereafter, the European Commission issued an order purporting to enjoin Romania from complying with the award. The *Micula* claimants promptly challenged that order before the European Union's General Court.[12] Romania, meanwhile, sought review of the award before an *ad hoc* annulment committee within the framework of the ICSID Convention.[13] That committee refused Romania's request to stay enforcement of the award until the conclusion of the annulment procedure, however, because Romania refused to promise that it would comply with the award if it was upheld by the Committee.[14]

While the annulment proceedings continued, the *Micula* claimants sought to enforce their award before various national courts. Article 54 of the ICSID Convention obliges each contracting state to the ICSID Convention to enforce an ICSID award 'as if it were a final judgment of a court in that state'.[15] A petition for enforcement of the award was filed with the United States federal district court in Washington DC on 11 April 2014.

The CJEU's Achmea decision was handed down while the Miculas' petition to enforce the ICSID award was pending in Washington, DC

The CJEU, the European Union's highest judicial body, issued its decision in *Achmea* while the *Micula* claimants' enforcement action was pending before the federal district court in Washington, DC.

The background to the CJEU's decision in *Achmea* was as follows: a Dutch investor had brought a claim against Slovakia pursuant to the Netherlands-Slovakia BIT of 1992, challenging measures taken by the government that had adversely impacted its investments in the health insurance sector.[16] The resulting arbitration was conducted pursuant to the UNCITRAL Arbitration Rules with the arbitration seated in Germany. *Achmea* was successful in the arbitration. However, Slovakia immediately applied to annul the resulting award on the theory that investor-state arbitration under the treaty was contrary to EU law. Rather than decide the question on its own, the German Federal Court of Justice referred the question to the CJEU.[17]

In its judgment, the CJEU found that the dispute at issue could require the tribunal to apply European Union law and that its resolution within an investor-state arbitration would be final and not fully reviewable before the courts of European member state or the European courts, or both.[18] This, the CJEU reasoned, threatened 'consistency and uniformity in the interpretation of EU law.'[19] Accordingly, the CJEU explained, European Union law 'must be interpreted as precluding a provision in an international agreement concluded between member states . . . under which an investor from one of those member states may, in the event of a dispute concerning investments in the other member state, brings proceedings against the latter . . . before an arbitral tribunal'.[20]

The district court in Micula rejected a jurisdictional challenge based on Achmea

Under the ICSID Convention and US law, there are no grounds for challenging an ICSID award in the United States courts. Pursuant to 22 USC section 1650a, a federal court is obliged to treat an ICSID award as having the status of a final court from another US state.[21] It may not 'examine an ICSID award's merits, its compliance with international law, or the ICSID tribunal's jurisdiction to render the award'.[22] A district court's role when presented with an ICSID award consists of nothing more than an 'examin[ation of] the award's authenticity and enforce[ment of] the obligations imposed'.[23] Consistent with the ICSID Convention's self-contained annulment mechanism, review of ICSID awards is thus much more narrowly circumscribed than that of awards governed by the New York Convention.[24]

As a result, Romania used *Achmea* as the basis for an attack on the district court's subject matter jurisdiction with respect to a dispute involving a sovereign (Romania) under the US Foreign Sovereign Immunities Act (FSIA).[25] Under United States law, the FSIA is 'the sole basis for obtaining jurisdiction over a foreign state' in a US court.[26] The *Micula* claimants had pleaded that the court had subject matter jurisdiction over their dispute concerning the enforcement of the award against Romania pursuant to the FSIA's 'arbitration exception', which provides that '[a] foreign state shall not be immune . . . in any case . . . in which the action is brought . . . to confirm an award made pursuant to . . . an agreement to arbitrate, if . . . the . . . award is governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards'.[27] Romania (and the European Commission as *amicus curiae*) countered that the FSIA's arbitration exception could not apply because, consistent with the CJEU's ruling in *Achmea*, the arbitration agreement contained in the applicable treaty had been retroactively nullified upon Romania's accession to the European Union.[28]

Although an ICSID *ad hoc* annulment committee had already rejected this very argument, the district court proceeded to conduct its own analysis. It ultimately found that 'the concern that animated *Achmea* – the unreviewability of an arbitral tribunal's determination of EU law by an EU court' was not present in the case before it and enforced the award. It did so for two main reasons:

First, the court observed that, unlike in *Achmea*, 'all key events to the parties' dispute occurred before Romania acceded to the EU', such that, 'unlike in *Achmea* . . . Romania's challenged actions [i.e. the cancellation of the investment incentives] occurred when it remained outside the EU and subject, at least primarily, to its own domestic law.'[29]

Second, the court found that EU law was not yet controlling on Romania at the time of the measures complained of, such that the arbitration did not '"relate to the interpretation or application of EU law" in the sense that concerned the court in *Achmea*'.[30] The district court appears to have been comforted in this conclusion by the EU General Court's ruling, while the case was pending, that Romania's incentive scheme did not constitute a violation of EU law.[31]

Having thus distinguished *Achmea*, the district court rejected Romania's challenge to subject-matter jurisdiction under the FSIA, dismissed other arguments based on the European Union's State Aid law as moot, and ordered judgment for the *Micula*

claimants in the amount of US$331 million.[32] The DC Circuit in May 2020 affirmed per curiam on other grounds, noting in dicta that 'as the district carefully explained, Romania did not join the EU until after the underlying events here, so the arbitration agreement applied'.[33]

Questions raised by the district court's decision in Micula

Micula will naturally encourage claimants seeking to enforce intra-EU investor-state awards in the United States. But it does not take the arguments raised by Romania based upon *Achmea* off the table. To the contrary, the district court's opinion in *Micula* suggests that parties seeking to enforce awards based upon intra-EU bilateral investment treaties will have to focus on distinguishing *Achmea*. If so, key questions will likely be: whether the measures being challenged under an investment treaty occurred before or after a respondent state's EU accession; and the degree to which resolution of the dispute involves an arbitral tribunal in the 'interpretation or application of EU law'. The district court's approach – if not its result – may thus have created uncertainty about the extent to which US courts will effectuate the United States' treaty obligations – incorporated in federal statute – to enforce investor state awards under the ICSID Convention.[34]

The district court's approach is open to question in at least three respects.

First, although it accurately stated the standard applied in ICSID enforcement cases, the district court does not seem to have applied it. Indeed, 22 USC section 1650a, the statute implementing the United States obligations under article 54 of the ICSID Convention provides that an ICSID award 'shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several states'.[35] That is why, as the *Micula* district court recognised, 'a federal court is not permitted to examine an ICSID award's merits, its compliance with international law, or the ICSID tribunal's jurisdiction to render the award', all of which are questions for the arbitral tribunal under the ICSID framework.[36] A court's role is limited to confirming the award's authenticity and enforcing its obligations as a judgment.[37] In the *Micula* arbitration, the tribunal had found that it had jurisdiction over the parties and its conclusion had been upheld by an ICSID annulment committee. Where ICSID tribunals have the power to decide upon their own jurisdiction pursuant to article 41 of the ICSID Convention, there is a strong argument that the jurisdictional findings reached within the arbitration should have been accepted by the district court.[38]

Second, the *Micula* district court does not appear to have considered an alternative basis for subject-matter jurisdiction under the FSIA, that would have entirely avoided the need to engage with European Union law. In particular, the FSIA authorises a court to exercise subject-matter jurisdiction where a state has waived its sovereign immunity.[39] There is accordingly a reasonable argument that by becoming a party to the ICSID Convention, Romania waived any objection to subject matter jurisdiction in a foreseeable future action to enforce an ICSID award. The district court's *Achmea* analysis was directed at determining whether the FSIA's arbitration exception applied on the basis of a valid arbitration agreement in an intra-EU investment treaty, a finding of waiver could have sidestepped analysis of the treaty itself entirely.[40] The DC Circuit's holdings in *Creighton v Qatar* and more recently in *Tatneft v Ukraine*, that a sovereign's adoption of the New York Convention waived its immunity from suits to enforce arbitration awards under its terms in other states that signed the New York Convention, supports a waiver theory.[41] Such an approach could make it easier for federal district courts to avoid parsing the significance of *Achmea* while honoring the United States' international law obligations to enforce ICSID awards.

Third, it is questionable whether the district court distinguished sufficiently between public international law and specifically European law. The DC Circuit's brief statement that 'Romania did not join the EU until after the underlying events here, so the arbitration agreement applied', arguably implies that *Achmea* would otherwise have negated the agreement to arbitrate contained in the Swedish-Romanian treaty and preempted the United States' own treaty obligation to enforce ICSID awards.[42] A difficulty, however, is that the ICSID Convention is a public international law instrument that imposes obligations on the United States, while *Achmea* is part of a specifically European legal order which does not. Indeed, investor-state tribunals and ICSID annulment committees have consistently emphasized the distinction between public international law and European law in rejecting challenges to their jurisdiction based on the CJEU's reasoning in *Achmea*.[43] For its part, the *Micula* decision does not provide a clear explanation of why – had the court found its facts more closely analogous to *Achmea's* – European law should have prevailed over the United States' own treaty obligations under article 54 of the ICSID Convention.[44]

Micula's approach could be more pertinent in the case of a non-ICSID award for which enforcement would be sought under the New York Convention. A respondent state might attempt to challenge the validity of the underlying arbitration agreement pursuant to article V of the New York Convention. This might be attempted pursuant to article V(1), which allows (but does not require) a court to withhold recognition and enforcement of a foreign award where the parties to the underlying arbitration agreement 'were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it'.[45] That is fundamentally the European Commission's position, adopted by the CJEU in *Achmea*. Alternatively, an argument could conceivably be made under article V(2) that a US court's recognition of an intra-EU investor-state award in spite of the views of the CJEU and European Commission (and presumably also the respondent state) that such an award was contrary to European law would be contrary to US public policy.[46]

Even then, however, there would likely be a strong argument for deference to a tribunals' jurisdictional determination – including of questions related to *Achmea* – since the applicable arbitration rules would almost certainly have entrusted jurisdictional questions to the tribunal.[47] In practice, too, US courts will where possible avail themselves of the opportunity to leave questions of European law to the courts of a foreign arbitral seat with primary jurisdiction over an award. In *Novenergia v Spain*, for example, a federal district court stayed proceedings to enforce an Energy Charter Treaty (ECT) award in favour of Luxembourg investors pending the decision of the courts of Sweden, the arbitral seat, as to whether *Achmea*'s reasoning applies to an ECT Award. In so doing, the court observed that the issues presented by *Achmea* were 'of importance to the EU and better suited for initial review in their courts'.[48]

Future questions

Micula will not be the US courts' last word on intra-EU investor-state awards. Future cases may well afford federal district courts and perhaps the DC Circuit an opportunity to resolve some of the uncertainties identified above.

New issues will arise as well. As reflected in *Novenergia*, for example, the scope of *Achmea* is itself unsettled. European Union member states divided as to whether its holding applies to intra-EU investment arbitration under the ECT, a sector-specific, multilateral agreement that provides for investor-state arbitration, and to which many non-EU States, as well as the EU itself, are parties.[49] This is important because a large proportion of the intra-EU investor-state awards for which enforcement is being sought before United States courts are ECT awards arising out of disputed reforms to Spain's solar energy sector.

This question has added urgency in the context of another major development: in May 2020, 23 of the 27 EU member states announced a 'Termination Agreement' intended to 'implement' the *Achmea* judgment by terminating their intra-EU BITs.[50] All member states had previously pledged to terminate their intra-EU BITs.[51] The Termination Agreement requires signatories to resist intra-EU awards and is explicitly retroactive. The Termination Agreement also requires states to resist awards concluded before the *Achmea* judgment, while ostensibly requiring parties to intra-EU investor-state arbitrations pending at the time of the *Achmea* judgment to enter into 'structured dialogue' to reach a settlement and obliging European investor claimants to suspend their claims.[52] Unusually, the Termination Agreement also purports to cancel the relevant treaties' 'sunset clauses', which would otherwise extend the period of the relevant treaty for a term of years after notice of its termination.[53] It does not apply to arbitrations under the ECT or purport to affect participating states' obligations under the ICSID Convention.[54]

While the right of states to terminate treaties is beyond serious question, it is not clear that the retroactive aspects of the Termination Agreement are proper under public international law – or that investor-state tribunals will accept them. The agreement does, however, demonstrate the European Commission's commitment to opposing intra-EU BITs and is sure to generate complex issues about the proper relationship of European and public international law.

Conclusion

The decision in *Micula* raises many questions and leaves many unanswered. It is plainly not the end of the story – in the United States or Europe. US courts will be considering efforts to enforce intra-EU awards for the foreseeable future and jurisprudence in this area will continue to evolve. For the present, however, *Micula* signals that, *Achmea* notwithstanding, intra-EU investor-state awards remain enforceable in the United States if not quite assuredly so.

★ The authors gratefully acknowledge the assistance of Ms Lucia Gruet of Alston & Bird in the preparation of this article.

Notes

1 *See Micula v Government of Romania*, 404 F. Supp. 3d 265 (D.D.C. Sept. 11, 2019), *aff'd*, No. 19-7127, 2020 U.S. App. LEXIS 16008 (D.C. Cir. May 19, 2020). *See also Slowakische Republik (Slovak Republic) v Achmea BV*, Court of Justice of the European Union, Judgment, Case C-284/16 (Mar. 6, 2018) *(Achmea Judgment)*.

2 See, e.g., *EP Wind Project (Rom) Six Ltd. v Romania*, ICSID Case No. ARB/20/15 (registered May 19, 2020); *Adria Group B.V. and Adria Group Holding B.V. v Republic of Croatia*, ICSID Case No. ARB/20/6, (registered Mar. 2, 2020); *Hamburg Commercial Bank AG v Italian Republic*, ICSID Case No. ARB/20/3, (registered Jan. 21, 2020). The authors of this article are counsel to the claimants in several such investor-state disputes.

3 See European Commission 'EU Member States sign an agreement for the termination of intra-EU bilateral investment treaties' (May 5, 2020). Signatories of the Termination Agreement are Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia and Spain.

4 *See Novenergia II-Energy & Environment v Kingdom of Spain*, Civ. No. 18-cv-01148 (D.D.C. filed May 16, 2018) ($58.7 million); *Nextera Energy Global Holdings v Kingdom of Spain*, No.1:19-cv-01618-TSC (D.D.C. filed Jun. 3, 2019) ($291 million); *9REN Holdings S.A.R.L., v Kingdom of Spain*, No. 1:19-cv-01871 (D.D.C. filed Jun. 25, 2019) ($46.56 million); *CEF ENERGIA, B.V. v Italy*, No. 1:19-cv-03443 (D.D.C. filed Nov. 15, 2019) ($22 million); *RREEF Infrastructure (G.P.) Limited v Kingdom of Spain*, No. 1:19-cv-03783-CJN (D.D.C. filed Dec. 19, 2019) ($66.3 million); *Magyar Farming v Hungary*, No. 1:20-cv-00637-CKK (D.D.C. filed Mar. 4, 2020) ($7 million); *Infrared v Kingdom of Spain*, No. 1:20-cv-00817 (D.D.C. filed Mar. 25, 2020) ($28.2 million); *Foresight Lux. Solar 1 S.A.R.L. v Kingdom of Spain*, No. 1:19-cv-03171 (S.D.N.Y filed March 30, 2020) ($43.8 million); *Cube Infrastructure Fund SICAV v Kingdom of Spain* No. 1:20-cv-01708 (D.D.C filed Jun. 23, 2020) (€33.7 million). The authors of this article are counsel to the Petitioner in *Infrared v Kingdom of Spain*.

5 See *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v Romania* [I], ICSID Case No. ARB/05/20, Final Award, (Dec. 11, 2013) (*Micula Award*), ¶ 166.

6 The *acquis communautaire* is an accumulated body of laws and regulations to which all Member States of the European Union are expected to adhere and to adopt as a condition of entry. Articles 69 and 71 Romania's European Accession Agreement obliged Romania to harmonize its domestic legislation with the *acquis*. See also Europe Agreement establishing an association between the European Economic Communities and Romania (Feb. 1, 1993), Arts. 69-71 (requiring harmonization of Romanian and European Union law).

7 See *Micula* Award, ¶ 178 ('One of the key areas of tension between Romania and the EU during this process was the alignment of Romania's competition policy and state aid laws with the acquis communautaire').

8 The members of the tribunal in *Micula* were Dr Stanimir A Alexandrov (President), Dr Laurent Lévy, and Prof Georges Abi-Saab.

9 See *Micula* Award, ¶ 334 ("The Commission submits that '[i]f the Tribunal rendered an award that is contrary to obligations binding on Romania as an EU Member State, such award could not be implemented in Romania by virtue of the supremacy of EC law, and in particular State aid rules.'").

10 See *Micula* Award, ¶ 321.

11 See *Micula* Award, ¶ 1329. During the pendency of the *Micula* arbitration, Alexander Yanos was a partner at Freshfields Bruckhaus Deringer US LLP, which acted as counsel to Romania.

12 See Commission Decision (EU) 2015/1470 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania (30 March 2015). This decision in turn was quashed by the General Court in June 2019, on the basis that the award recognized a right to compensation for the investors existing *before* Romania's accession to the EU and thus that the Commission was precluded to apply EU state aid rules to this situation. See Judgment of the General Court 18 June 2019, *European Food SA and Others v Commission*, T-624/15, T-694/15 and T-704/15, ECLI:EU:T:2019:423. The General Court's decision is on appeal to the European Court of Justice. See Appeal brought

on 27 August 2019 by European Commission against the judgment of the General Court (Second Chamber, Extended Composition) delivered on 18 June 2019 in Case T-624/15: *European Food e.a. v Commission*.

13 ICSID Convention, Art. 52.

14 See *Ioan Micula, Viorel Micula and others v Romania*, ICSID Case No. ARB/05/20, Decision on Annulment (Feb. 26, 2016) (*Micula* Annulment) ¶¶ 36-37 (The Committee found that an appropriate condition, in this case, was a written undertaking by Romania confirming its obligation to enforce the Award under Article 53 of the Convention, which, according to the Committee . . . Romania subsequently declined to provide such written undertaking and, on September 7, 2014, the stay of enforcement of the Award was therefore automatically revoked.). The ad hoc committee comprised Dr. Claus von Wobeser (President), Dr. Bernardo M. Cremades and Judge Abdulqawi A. Yusuf. Ultimately, the committee upheld the Award in 2016. In doing so it specifically rejected the theory—later adopted in *Achmea*—that the tribunal had been without jurisdiction because EU Treaties had superseded the Swedish-Romania BIT. See *Micula* Annulment ¶ 330.

15 Article 54 is implemented in U.S. law by 22 U.S.C. § 1650a ('An award of an arbitral tribunal rendered pursuant to chapter IV of the [ICSID Convention] shall create a right arising under a treaty of the United States. The pecuniary obligations imposed by such an award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States. The Federal Arbitration Act (9. U.S.C. §§ 1 et seq.) shall not apply to enforcement of awards rendered pursuant to the [ICSID Convention]').

16 See *Achmea B.V. (formerly known as 'Eureko B.V.') v The Slovak Republic* (UNCITRAL), PCA Case No. 2008-13, Final Award (Dec. 7, 2012).

17 Request for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Federal Court of Justice, Germany) (Mar. 3, 2016).

18 See *Achmea* Judgment ¶ ¶ 55-60.

19 *Achmea* Judgment ¶ ¶ 35, 60.

20 *Achmea* Judgment ¶ 60. More specifically, the CJEU considered that intra-EU investor-state dispute resolution was incompatible with the supranational framework of EU law and that articles 267 and 344 of the Treaty on the Functioning of the European Union (TFEU) precluded investor-state dispute settlement provisions in intra-EU BITs. See also Treaty on the Functioning of the European Union, 2008 O.J. C 115/47, Articles 267 and 344.

21 See *TECO Guat. Holdings, LLC v Republic of Guatemala*, No. CV 17-102 (RDM), 2018 WL 4705794, at *2 (D.D.C. Sept. 30, 2018), quoting *Mobil Cerro Negro*, 863 F.3d at 102; see also *Mobil Cerro Negro Ltd. v Bolivarian Republic of Venez.*, 87 F. Supp. 3d 573, 578 (S.D.N.Y. 2015), rev'd on other grounds, 863 F.3d 96 (2d Cir. 2017) (stating that ICSID 'determinations are final' and that national courts 'may review such awards solely to confirm their authenticity').

22 See *Mobil Cerro Negro*, 853 F.3d at 118; *TECO Guat. Holdings, LLC v Republic of Guatemala*, No. CV 17-102 (RDM), 2018 WL 4705794, at *2 (D.D.C. Sept. 30, 2018) (same).

23 See *TECO Guat. Holdings, LLC v Republic of Guatemala*, No. CV 17-102 (RDM), 2018 WL 4705794, at *2 (D.D.C. Sept. 30, 2018), quoting *Mobil Cerro Negro Ltd. v Bolivarian Republic of Venez.*, 87 F. Supp. 3d at 102 (S.D.N.Y. 2015).

24 Investor-state awards subject to enforcement under the New York Convention are subject to limited but still significantly broader judicial review than ICSID awards. When made at a foreign seat, recognition of such awards may be challenged before a US court on the non-merits grounds listed in the New York Convention. See New York Convention (1958), Arts. V(1) and (2). US-seated awards may also be challenged pursuant to the grounds for vacatur enumerated in Chapter 1 of the Federal Arbitration Act. See 9 U.S.C. § 10(a).

25 See 28 U.S.C. §§ 1605-1607.

26 See *Micula v Gov't of Romania*, 404 F. Supp. 3d 265, 276 (D.D.C. 2019). In an earlier ruling, the Micula district court held that even though an ICSID award has the status of a state court judgment under U.S. law, such an award may not be registered on an *ex parte* basis in the same manner as a private court judgment. Instead, ICSID award creditors are still required "to file a plenary action, subject to the ordinary requirements of process under the Foreign Sovereign Immunities Act." See *Micula v Gov't of Rom.*, 104 F. Supp. 3d 42, 44 (D.D.C. 2015).

27 See 28 U.S.C. § 1605(a)(6) (discussed in *Micula*, 404 F. Supp. 3d at 275-78).

28 See *Micula*, 404 F. Supp. 3d at 277-80.

29 See *Micula*, 404 F. Supp. 3d at 279.

30 See *Micula*, 404 F. Supp. 3d at 279.

31 The General Court reasoned that the incentives, and payment of compensation for their cancellation, did not violate EU State Aid rules because the relevant events all preceded Romania's entry into the European Union and the applicability of European law. Judgment of the General Court (Second Chamber, Extended Composition) of 18 June 2019 in Cases T-624/15, T-694/15 and T-704/15 European Food SA and Others v European Commission (*Micula*) (discussed in *Micula v Gov't of Romania*, 404 F. Supp. 3d 265, 277 (D.D.C. 2019)). The European Commission has appealed the General Court's decision to the CJEU. See Appeal brought on 27 August 2019 by European Commission against the judgment of the General Court (Second Chamber, Extended Composition) (18 June 2019) in Case T-624/15: *European Food e.a. v Commission* (Case C-638/19 P) (2019/C 348/15).

32 Romania also alleged that the act of state and foreign compulsion doctrines prohibited the award's enforcement and that it had already fully satisfied the award. The district court found both of these defences 'overtaken by events' given the EU General Court's finding that payment of the Micula award would not violate EU State Aid rules. *Micula v Gov't of Rom.*, 404 F. Supp. 3d at 281. The district court also rejected Romania's satisfaction defence on the facts. See id. at 285.

33 See *Micula v Gov't of Rom.*, No 19-7127, 2020 U.S. App. LEXIS 16008, *2 (D.C. Cir. May 19, 2020).

34 This is particularly the case given that, with limited exceptions, the District of Columbia is the presumptive venue for all actions against foreign sovereigns, including to enforce investor-state arbitration awards. See 28 U.S.C. § 1391(f)(4).

35 See 22 U.S.C. § 1650a(a).

36 See *Micula*, 404 F. Supp. 3d at 275 (citing *Mobil Cerro Negro, Ltd. v Bolivarian Republic of Venez.*, 863 F.3d at 102, 11 (2d Cir. 2017)).

37 See *Mobil Cerro Negro*, 863 F.3d at 102. See also id. at 121 (observing that the ICSID-award debtor can make 'non-merits challenges' to an award, such as to 'the authenticity of the award presented for enforcement, the finality of the award, or the possibility that an offset might apply to the award that would make execution in the full amount improper'). This limited role "reflects an expectation [under the Convention] that the courts of a member nation will treat the award as final.' *Micula*, 404 F. Supp. 3d at 275-76.

38 See ICSID Convention, Art. 41(1) ('The Tribunal shall be the judge of its own competence.'). See also *First Options of Chicago, Inc. v Kaplan*, 514 U.S. 938, 943 (1995).

39 See 28 U.S.C. § 1605(a)(1) ('A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in

any case in which the foreign state has waived its immunity either explicitly or by implication ').

40 This argument was not raised in *Micula*.

41 See *Creighton Ltd. v Qatar*, 181 F.3d 118, 123 (D.C. Cir. 1999) (a sovereign, by signing the New York Convention, waives its immunity from arbitration-enforcement actions in other signatory states); *Tatneft v Ukraine*, 771 Fed. Appx. 9, 10 (D.C. Cir. 2019) ('signatories to the New York Convention must have contemplated arbitration-enforcement actions in other signatory countries, including the United States').

42 See *Micula v Gov't of Rom.*, No. 19-7127, 2020 U.S. App. at *2 (D.C. Cir. May 19, 2020).

43 International investment tribunals have consistently rejected intra-EU jurisdictional objections. As expressed in categorical terms by the *RREEF v Spain* tribunal, 'in all published or known investment treaty cases in which the intra-EU objection has been invoked by the Respondent, it has been rejected. The present decision on this point therefore falls squarely within the continuity of this consistent pattern of decision-making by international tribunals.' *RREEF v Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction (Jun. 6, 2016) ¶ 89 (emphasis added). See eg, (i) rejecting the intra-EU objection in claims under bilateral investment treaties: *Eastern Sugar B.V. v Czech Republic*, UNCITRAL, Partial Award (Mar. 27, 2007) ¶¶ 159 *et seq.*; *Rupert Joseph Binder v Czech Republic*, UNCITRAL, Award on Jurisdiction (Jun. 6, 2007) ¶¶ 59-67; *A11Y Ltd. v Czech Republic*, UNCITRAL, Award on Jurisdiction (Feb. 9, 2017) (decision reported by IA Reporter on Feb. 14, 2017); *Jan Oostergetel and Theodora Laurentius v Slovak Republic*, UNCITRAL, Decision on Jurisdiction (Apr. 30, 2010) ¶¶ 72-109; *Addiko Bank AG and Addiko Bank d.d. v Republic of Croatia*, ICSID Case No ARB/17/37, Final Award (Jun. 12, 2020) and (ii) rejecting the *intra-EU* objection in claims under the Energy Charter Treaty: *AES Summit Generation Ltd. and AES-Tisza Erömü Kft. v Hungary*, ICSID Case No. ARB/07/22, Award (Sept. 23, 2010) ¶¶ 7.6.7 – 7.6.9; *Electrabel S.A. v Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (Nov. 20, 2012) ¶¶ 4.146 *et seq.*; *Blusun S.A. et al. v Italy*, ICSID Case No. ARB/14/3, Award (Dec. 27, 2016) ¶¶ 277 *et seq.*; *Charanne and Construction Investments v Spain*, SCC Case No. V062/2012, Award (Jan. 21, 2016) ¶¶ 424-50; *RREEF Infrastructure (G.P.) Limited et al. v Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction (Jun. 6, 2016) ¶¶ 71-90; *Isolux Netherlands BV v Spain*, SCC Case V 2013/153, Final Award (Jul. 6, 2016) ¶ 656; *Landesbank Baden-Württemberg, and others v Spain* (ICSID Case No. ARB/15/45), Decision on the Intra-EU Jurisdictional Objection, (Feb. 25, 2019) ¶ 202. But see *Theodoros Adamakopoulos and others v Republic of Cyprus*, ICSID Case No. ARB/15/49, Dissent of Professor Marcelo Kohen (Feb. 3, 2020) (opposing a finding of jurisdiction under an intra-EU bilateral investment treaty).

44 *Cf.* William W. Park & Alexander A. Yanos, *Treaty Obligations and National Law: Emerging Conflicts in International Arbitration*, 58 Hasting L. J. 251 (2006) (discussing tension between US rules on jurisdiction and forum non conveniens with US obligations under the New York Convention). Notably, in a case brought by the *Micula* claimants in connection with efforts to enforce their Award in the United Kingdom, the United Kingdom Supreme Court found that while European Union law might control when interpreting a treaty exclusively among member states of the EU, it could not displace the United Kingdom's award enforcement obligations under the ICSID Convention which were owed not just to EU member states, but to all states party to the ICSID Convention. See *Micula and others (Respondents/Cross-Appellants) v Romania* (Appellant/Cross-Respondent), [2020] UKSC 5 at ¶¶ 104-06.

45 New York Convention, Article V(1)(a).

46 New York Convention, Article V(2)(b).

47 See generally *First Options*, 514 U.S. at 943; *BG Group PLC v Republic of Argentina*, 572 U.S. 25, 33 (2014); *Chevron Corp. v Ecuador*, 795 F.3d 200, 207-08 (D.C. Cir. 2015); ICSID Convention, Art. 41.

48 *Novenergia II — Energy & Env't (SCA) v Kingdom of Spain*, 2020 U.S. Dist. LEXIS 12794 Foreign courts—and especially those outside of the European Union—may, of course, disagree with the CJEU's position. See, eg, Judgment of the Swiss Supreme Court (*Tribunal Fédéral*) (4A_34/2015) (Oct. 6, 2015) (upholding the award rendered in *EDF Int'l v Hungary*, an UNCITRAL arbitration under the France-Hungary BIT seated in Switzerland and rejecting the argument that EU law preempted intra-EU BIT obligations).

49 See The Energy Charter Treaty, 34 I.L.M. 360, 385 (1995). European Union member states are divided about whether the ECT should meet the same fate as intra-EU bilateral investment treaties. When, in January of 2019, 28 EU member states announced their intention to terminate all intra-EU bilateral investment treaties, only 22 were willing to take the position that *Achmea* also applied to intra-EU investor-state arbitration under the ECT. See Declaration of the Representatives of the Governments of the Member States of 15 January 2019 on the Legal Consequences of the Judgment of the Court of Justice in Achmea and on Investment Protection in the European Union (22 signatories). Another six member states found *Achmea* 'silent' with respect to the ECT. Five of these (Sweden, Luxembourg, Finland, Malta and Slovenia) urged that the issue be allowed to be further developed in litigation before member state courts, while Hungary more affirmatively asserted the position that Achmea did not apply to ECT claims. See also Tom Jones, 'EU countries to cancel BITs post-Achmea,' *Global Arbitration Review* (Jan. 17, 2019).

50 See Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union, SN/4656/2019/ INIT OJ L 169, 29.5.2020, p. 1–41 (BG, ES, CS, DA, DE, ET, EL, EN, FR, HR, IT, LV, LT, HU, MT, NL, PL, PT, RO, SK, SL). Signatories of the Termination Agreement are Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia and Spain. As of this writing, the Termination Agreement has not yet entered into force. This will occur after two formal ratifications.

51 Despite the United Kingdom's Brexit in January of 2020, the European Commission has commenced "infringement proceedings" against both the UK and Finland for having declined to sign the Termination Agreement. The Commission maintains that EU law continues to apply to UK BITs through the end of 2020. See Tom Jones, 'UK and Finland face legal action over intra-EU BITs,' *Global Arbitration Review* (May 14, 2020).

52 See Termination Agreement, Article 9. In addition, Article 7 of the Termination Agreement requires States to: (i) inform tribunals about the alleged legal consequences of the Achmea Judgment and (ii) request that national courts (including non-EU courts) 'set the arbitral award aside, annul it or to refrain from recognizing or enforcing it The Termination Agreement does not affect arbitrations in which a final award or settlement was reached prior to March 6, 2018 (the date of the CJEU's *Achmea* decision), provided that the award was at that date duly executed with no challenge pending. See Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union SN/4656/2019/ INIT OJ L 169, 29.5.2020.

53 The Termination Agreement purports to make such sunset clauses ineffective, both under treaties terminated as a

consequence of the agreement as well as under previously terminated treaties whose sunset clauses would otherwise have remained in effect. See termination agreement Arts. 2 and 3.

54 Irrespective of whether they sign onto the Termination Agreement, there will be a strong argument that, so long as respondent states remain contracting parties to the ICSID Convention, an arbitral tribunal's views on these issues should be decisive for a US court. See ICSID Convention Article 41(a) ('The Tribunal shall be judge of its own competence.'). Likewise, under the New York Convention, if the arbitration agreement embodied in the relevant treaty gives the tribunal competence over its own jurisdiction, and such an award had not otherwise been set aside by the courts of the seat of arbitration, the tribunal's jurisdictional decision likely ought also to control in the U.S. See generally *First Options*, 514 U.S. at 943; *Chevron*, 795 F.3d at 207-08.

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